LIBRARY
SUPREME COURT, U.S.

Supreme Court, U.S.
FILED
APR 26 1971
E. ROBERT SEAVER, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

No. 1633

VILLAGE OF CHICAGO RIDGE,
a Municipal Corporation, Petitioner

v.

JAMES L. GARDNER, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

SHELDON P. MIGDAL, ESQ.
6 N. Michigan
Chicago, Illinois 60602

Counsel for Petitioner
Village of Chicago Ridge,
a Municipal Corporation

La Salle Street Press—Chicago/PrinterLink

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

No......

VILLAGE OF CHICAGO RIDGE,
a Municipal Corporation, Petitioner

v.

JAMES L. GARDNER, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

Petitioner, Village of Chicago Ridge, a municipal corporation, petitions for a Writ of Certiorari to review a Decision of the Appellate Court of Illinois, and a subsequent denial by the Supreme Court of Illinois of an Appeal as a Matter of Right or, in the Alternative, Petition for Leave to Appeal from that Decision.

OPINIONS

The denial by the Supreme Court of Illinois of Petitioner's Appeal as a Matter of Right or, in the Alternative, Petition for Leave to Appeal is unreported; a copy of the Order of Denial is attached to this Petition as "Appendix

A". The Decision of the Appellate Court of Illinois, which reversed the trial court's verdict in favor of Petitioner is reported at 128 Ill. App. 2d 157, 262 N.E. 2d 829 (1970). A copy of said Decision is attached to this Petition as "Appendix B". A copy of Petitioner's Appeal as a Matter of Right or, in the alternative, Petition for Leave to Appeal is attached hereto as "Appendix C".

JURISDICTION

On August 19, 1970, the Appellate Court of Illinois, First District, Fourth Division reversed in part and affirmed in part a judgment of the Circuit Court of Cook County, Illinois. A rehearing was denied on October 5, 1970. The Supreme Court of Illinois denied an Appeal as a Matter of Right or, in the Alternative, Petition for Leave to Appeal, on January 26, 1971.

Jurisdiction is invoked under 28 U.S.C. §1257(3).

QUESTIONS PRESENTED

1. Does the Illinois adverse witness statute (Ill. Rev. Stat., Ch. 110, §60) as interpreted by the Appellate Court of Illinois herein deprive Petitioner of equal protection of the law guaranteed by the Fourteenth Amendment to the Constitution of the United States?

2. Does the denial of Petitioner's Appeal as a Matter of Right or, in the Alternative, Petition for Leave to Appeal deny Petitioner procedural due process guaranteed by the Fourteenth Amendment to the Constitution of the United States?

CONSTITUTIONAL PROVISIONS AND STATUTES

U. S. Const. amend XIV, §1.

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of

the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Ill. Rev. Stat., Ch. 110, §60.

Upon the trial of any case any party thereto or any person for whose immediate benefit the action is prosecuted or defended, or the officers, directors, managing agents or foreman of any party to the action, may be called and examined as if under cross-examination at the instance of any adverse party. The party calling for the examination is not concluded thereby but may rebut the testimony thus given by countertestimony and may impeach the witness by proof of prior inconsistent statements.

Illinois Supreme Court Rule 317 (Ill. Rev. Stat., Ch. 110A, §317)

Appeals from the Appellate Court shall lie to the Supreme Court as a matter of right in cases in which a question under the constitution of the United States or of this state arises for the first time in and as a result of the action of the Appellate Court. The appeal shall be initiated by filing a petition in the form prescribed by rule 315, except that (a) the petition shall be entitled "Petition for Appeal as a Matter of Right"; (b) item (1) of the petition shall state that the appeal is taken as a matter of right and may pray in the alternative for leave to appeal; and (c) item (5) shall contain argument as to why appeal to the Supreme Court lies as a matter of right and may also contain argument as to why in the alternative leave to appeal should be allowed as a matter of sound judicial discretion. In other respects the procedure is governed by rule 315. If the Court allows the petition, excerpts from record or an abstract and briefs shall be filed as provided in the case of appeal by leave under rule 315.

Illinois Supreme Court Rule 315(a) [Ill. Rev. Stat., Ch. 110A, §315(a)]

> A petition for leave to appeal to the Supreme Court from the Appellate Court may be filed in any case not appealable from the Appellate Court as a matter of right. Whether such a petition will be granted is a matter of sound judicial discretion. The following, while neither controlling nor fully measuring the court's discretion, indicate the character of reasons which will be considered: the general importance of the question presented; the existence of a conflict between the decision sought to be reviewed and a decision of the Supreme Court, or of another division of the Appellate Court; the need for the exercise of the Supreme Court's supervisory authority; and the final or interlocutory character of the judgment sought to be reviewed.

Illinois Supreme Court Rule 302(a) [Ill. Rev. Stat., Ch. 110A, §302(a)]

> Appeals from the final judgments of circuit courts shall be taken directly to the Supreme Court (1) in cases involving revenue, (2) in cases involving a question arising under the constitution of the United States or of this state, (3) in cases of habeas corpus, (4) in proceedings to review orders of the Industrial Commission, and (5) in proceedings to review orders of the Illinois Commerce Commission.

STATEMENT OF THE CASE

Plaintiff, James L. Gardner, sued the Village of Chicago Ridge, the Village of Worth, police officers Stanley Wank and Steve Horvath of the Village of Chicago Ridge Police Department, police officers Richard Demblon and Bernard Bartuch of the Village of Worth Police Department, Frank Skubis, Gary LaValley, Richard Souliotis, and Larry Posthuma for personal injuries plaintiff allegedly sustained. At the trial which ensued, plaintiff called as adverse witnesses defendants Bartuch, Wank, and Horvath, pursuant

to Section 60 of the Illinois Civil Practice Act (Ill. Rev. Stat. Ch. 110, Sec. 60). Over objection of counsel for plaintiff, the trial court advised the jury at the time of testimony that the testimony of each of the three adverse witnesses was confined to the party as to whom the witness was called, and was not to be applied against the other defendants in the case. At the close of plaintiff's evidence, the trial court directed a verdict in favor of police officers Wank, Horvath, Demblon, and Bartuch, and their two respective municipalities.

Plaintiff appealed the directed verdicts; the Illinois Appellate Court affirmed the judgment as to defendant Demblon, but reversed and remanded for a new trial as to the other police officers and as to the Villages of Chicago Ridge and Worth; a Petition for Rehearing was denied. In reversing the judgments, the Appellate Court of Illinois stated, *inter alia,* that the confinement of the adverse witness testimony to the party as to whom the witness was called was erroneous. Under the law of Illinois this ruling by the Appellate Court constitutes "law of the case" which binds the trial court in a new trial.

The Village of Chicago Ridge, as well as Steve Horvath, Stanley Wank, Bernard Bartuch and the Village of Worth, filed an Appeal as a Matter of Right or, in the Alternative, Petition for Leave to Appeal to the Supreme Court of Illinois. Ill. Rev. Stat., Ch. 110 A, §§ 317, 315(a). As a basis for the Appeal it was asserted that the application of testimony received under Section 60 of the Illinois Civil Practice Act against parties as to whom the witnesses was not called denies those parties the equal protection of the law guaranteed by the Fourteenth Amendment to the Constitution of the United States. Without making any distinction between the Appeal as a Matter of Right and the alternative Petition for Leave to Appeal filed in compliance with Rule 317, the Supreme Court of Illinois entered an order

denying the Appeal and assessing costs against appellants. The Appeal as a Matter of Right was thus denied without any hearing, a situation arising from the ambiguous provisions of Rule 317.

REASONS FOR GRANTING THE WRIT

(1)

The Illinois adverse witness statute (Ill. Rev. Stat., Ch. 110, § 60) as interpreted by the Illinois Appellate Court herein deprives Petitioner of equal protection of the law as guaranteed by the Fourteenth Amendment to the Constitution of the United States.

The opinion of the Appellate Court of Illinois concludes with a holding that it is error to limit the testimony of a witness called under Section 60 of the Illinois Civil Practice Act to the party as to whom the witness is called. A witness called under that Section may be ". . . examined as if under cross-examination at the instance of any adverse party". Moveover, the party calling the witness under that Section " . . . may rebut the testimony thus given by countertestimony and may impeach the witness by proof of prior inconsistent statements".

If a party is sued alone, Section 60 can be invoked only if a witness sought to be called is a witness who meets the requirements of the statute. The witness can otherwise be called, of course, but only subject to those rules applicable to witnesses who do not qualify as "adverse". The Appellate Court opinion herein deprives a litigant of protection built into Section 60. According to that opinion, even though a witness is not adverse as between the plaintiff and one defendant, the plaintiff may call him to testify against that defendant under Section 60 if the witness is adverse as between the plaintiff and any *other* defendant. This interpretation of Section 60 by the Appellate Court of Illinois is highly discriminatory in favor of sole de-

fendants, as opposed to multiple defendants. The Fourteenth Amendment to the Constitution of the United States forbids the unequal treatment inherent within this interpretation of Section 60.

(2)

The denial of Petitioners Appeal as a Matter of Right or, in the Alternative, Petition for Leave to Appeal denies Petitioner procedural due process guaranteed by the Fourteenth Amendment to the Constitution of the United States.

Illinois Supreme Court Rule 317 grants an appeal as a matter of right to the Supreme Court of Illinois when a question under the Constitution of the United States or under the Constitution of the State of Illinois arises for the first time in and as a result of the action of the Appellate Court of Illinois. Ill. Rev. Stat., Ch. 110A, § 317. Petitioner, Village of Chicago Ridge, in its Appeal as a Matter of Right or, in the Alternative, Petition for Leave to Appeal to the Supreme Court of Illinois, asserted a question under the Constitution of the United States which arose for the first time in and as a result of the action of the Appellate Court of Illinois. Petitioner asserted that the Appellate Court's holding that it is error to limit the testimony of a witness called under Section 60 of the Illinois Civil Practice Act (Ill. Rev. Stat., Ch. 110, § 60) to the party as to whom the witness is called, constitutes a denial of equal protection of the law guaranteed by the Fourteenth Amendment to the Constitution of the United States. The Supreme Court of Illinois denied the Appeal without even referring to the issue presented.

There are three possible reasons for the denial of the Appeal as a Matter of Right, each of which results in denial of due process: (1) the Supreme Court of Illinois held that *no* Constitutional question arose for the first time as a result of the action of the Appellate Court of Illinois; (2) the

Supreme Court of Illinois held that a Constitutional que tion, but not a "substantial" or "fairly debatable" Constitu tional question, arose for the first time as a result of th action of the Appellate Court of Illinois;[1] (3) the Suprem Court of Illinois, in denying the Appeal as a Matter o Right, decided that a Constitutional question arose, co sidered the substance of that Constitutional question, an decided the question adversely to Petitioner.

If the Supreme Court of Illinois held that no Constitu tional question arose and denied the Appeal as a Matte of Right, its holding is clearly unwarranted; a Constitu tional issue *did arise,* as discussed above. Petitioner's de nial of Illinois Supreme Court review of that Constitutiona question, pursuant to Rule 317, constitutes a denial of pro cedural due process guaranteed by the Fourteenth Amend ment to the Constitution of the United States.

If the Supreme Court of Illinois held that a Constitu tional question, but not a "substantial" or "fairly debat able" question arose, and therefore denied the Appeal as Matter of Right, Petitioner is still denied procedural du process. In the context of the "direct appeal" from th circuit court to the Supreme Court of Illinois, the "sub

[1] Although the Supreme Court of Illinois has not yet interprete "question" in the context of Illinois Supreme Court Rule 317, i has interpreted "question" in the context of Illinois Supreme Cour Rule 302(a) which provides that, "Appeals from the final judg ments of circuit courts shall be taken directly to the Supreme Cour . . . in cases involving a question arising under the constitution o the United States or of this State . . ." Ill. Rev. Stat., Ch. 110A § 302(a). The Supreme Court of Illinois has interpreted "question in this context as being a "substantial q estion" or a "fairly debat able question". *First National Bank & Trust Co.* vs. *City of Evans ton,* 30 Ill. 2d 479, 482-483, 197 N.E. 2d 705 (1964); *People* v *Arbuckle,* 31 Ill. 2d 163, 201 N.E. 2d 102 (1964); *Herman* vs *Prudence Mutual Casualty Co.,* 38 Ill. 2d 98, 230 N.E. 2d 23 (1967).

stantial" or "fairly debatable" standard *can* be used without offending due process. In that context, when the Supreme Court of Illinois decides that a Constitutional question, but not a "substantial" or "fairly debatable" question, arose at the circuit court level, it remands the case to the Appellate Court of Illinois for consideration. *First National Bank & Trust Co., supra, Note 1.* The appellant is afforded appellate review of his Constitutional question thereby. However, in the context of a "non-substantial, non-debatable question" arising at the appellate level, there need be no remand, under the present holding; yet, *the Constitutional question admittedly exists.* Due process is offended thereby.

If the Supreme Court of Illinois, in denying the Appeal as a Matter of Right, decided that a Constitutional question arose, considered the substance of that Constitutional question, and decided the question adversely to Petitioner, the jurisdictional nature of Rule 317 was blatantly ignored by that Court. Moreover, Petitioner's Constitutional question was heard in chambers, with Petitioner being conspicuous by absence. Such procedure harshly offends due process.

Illinois Supreme Court Rule 317 states that an appeal lies as a matter of right when, as in this case, a Constitutional question arises by reason of the decision of the Illinois Appellate Court. Petitioner prosecuted an appeal pursuant to that Rule, which appeal was denied without reason and without hearing. Certainly, the denial deprived Petitioner of due process of law. Rule 317 procedure is ambiguous at best. When the Supreme Court of Illinois uses that procedure to deny a hearing on a Constitutional question, that Rule cannot stand.

CONCLUSION

For the reasons stated, Petitioner respectfully requests that the Petition for a Writ of Certiorari be granted.

Respectfully submitted,

SHELDON P. MIGDAL
6 N. Michigan
Chicago, Illinois 60602

Counsel for Petitioner
Village of Chicago Ridge,
a Municipal Corporation

United States of America

State of Illinois
Supreme Court } ss.

At a Term of the Supreme Court, *begun and held in Springfield, on Monday, the* eleventh *day of* January *in the year of our Lord, one thousand nine hundred and* seventy-one *, within and for the State of Illinois.*

PRESENT: ROBERT C. UNDERWOOD, CHIEF JUSTICE

JUSTICE WALTER V. SCHAEFER — JUSTICE THOMAS E. KLUCZYNSKI

JUSTICE DANIEL P. WARD — JUSTICE CHARLES H. DAVIS

JUSTICE JOSEPH H. GOLDENHERSH — JUSTICE HOWARD C. RYAN

WILLIAM J. SCOTT, ATTORNEY GENERAL

ROBERT G. MILEY, MARSHAL

ATTEST: JUSTIN TAFT, CLERK

Be It Remembered, *that, to-wit: on the* 26th *day of* January *1971 , the same being one of the days of the term of Court aforesaid, the following proceedings were, by said court, had and entered of record, to-wit:*

James L. Gardner,

Respondent

No. 43761 vs.

Village of Chicago Ridge, a municipal corporation, et al.,

Petitioners

Petition for Leave to Appeal from Appellate Court
First District
53380

And now on this day the Court having duly considered the Petition for Leave to Appeal herein and being now fully advised of and concerning the premises, doth overrule the prayer of the petition and denies Leave to Appeal herein.

And it is further considered by the Court that the said Respondent recover of and from the said Petitioners costs by him *in this behalf expended, to be taxed, and that* he *have execution therefor.*

I, JUSTIN TAFT, *Clerk of the Supreme Court of the State of Illinois and keeper of the records, files and Seal thereof, do hereby certify that the foregoing is a true copy of the final order of the said Supreme Court in the above entitled cause of record in my office.*

In Witness Whereof, *I have hereunto subscribed my name and affixed the Seal of said court this* 22nd *day of* April *, 19* 71.

Justin Taft

Clerk, Supreme Court of the State of Illinois.

APPENDIX B

OPINION OF THE APPELLATE COURT.

MR. PRESIDING JUSTICE STAMOS Delivered the Opinion of the Court.

Plaintiff sued the Villages of Chicago Ridge and Worth, police officers Richard Demblon and Sgt. Bernard Bartuch of the Village of Worth Police Department, police officers Stanley Wank and Steve Horvath of the Village of Chicago Ridge Police Department and Frank Skubis, Gary LaValley, Richard Souliotis and Larry Posthuma for personal injuries he sustained. The theory of plantiff's case is that, under the circumstances shown by the evidence, defendant police officers and villages were negligent in not protecting him from attack by defendants Souliotis and LaValley.

This is the second occasion that this litigation has been before this court for review. The initial appeal was also by plaintiff from an order dismissing the complaint as to the municipalities. As to the duties of the police under the circumstances of this case, we refer to the opinion in 71 Ill. App. 2d 373 which held that the dismissal was erroneous and remanded the cause. A trial ensued and at the close of plaintiff's evidence the court directed a verdict in favor of the four police officers and their respective municipalities.*

* Defendants Souliotis, Skubis and Posthuma were dismissed from the instant litigation just prior to trial, Souliotis and Skubis having died. After the directed verdicts were granted in favor of the police officers and their respective municipalities, the trial continued and resulted in a $20,000.00 jury verdict against LaValley who failed to appear or defend. This judgment is not involved in this appeal.

Plaintiff correctly contends that the trial court's action must be viewed by the standard enunciated in *Pedrick* v. *Peoria and Eastern R. R.*, 37 Ill. 2d 494 wherein the court stated at page 510:

> ". . . verdicts ought to be directed . . . only in those cases in which all of the evidence, when viewed in its aspect most favorable to the opponent, so overwhelmingly favors movant that no contrary verdict based on that evidence could ever stand."

Generally the facts, taken in their aspect most favorable to plaintiff, are as follows: Plaintiff was employed as a truck driver. He also held the position of trustee for the Village of Chicago Ridge and was Chairman of the police committee of the Board. On March 8, 1962, he was a chaperone at a teenage dance being held in the Legion Hall in Chicago Ridge when defendants Richard Souliotis, Gary LaValley and Frank Skubis entered the premises. They had obviously been drinking and when advised to depart, they treated plantiff to a torrent of obscenity and profanity. They emerged from the building and continued their abuse and threatened plaintiff that they would return. Plaintiff went to the telephone to call the Chicago Ridge police and just as he completed dialing, he was grabbed by Souliotis who struck plaintiff and told him that if plaintiff summoned the police, these defendants would put him in the hospital. They then entered their car and drove off. Plaintiff immediately telephoned the Chicago Ridge police, advising them of what had occurred and furnished a description of defendants, their vehicle and license number. Defendant police officers Wank and Horvath arrived in response to plaintiff's phone call. They observed that plaintiff's shirt was torn and blood stained. Plaintiff related in detail what had transpired and that plaintiff was warned not to summon the police or he would end up in the hospital.

An hour later officer Horvath returned to the Legion Hall and informed plaintiff that the police were detaining four young men and a car fitting the description furnished

by plaintiff, about a half block from the dance hall. Horvath asked plaintiff to walk over to the scene of the arrest to identify them. As plaintiff reached a point where he was about to cross Ridgeland Avenue, he observed Sgt. Bartuch standing next to Souliotis at the right front fender of a police car. Officer Wank was on the shoulder of the road just behind Skubis and LaValley. When the assailants and their companions saw plaintiff coming across the street, they renewed their torrent of profanity and obscenity at the top of their voices and shouted that they were going to get plaintiff for calling the police and again threatened then and there to put him and members of his family in the hospital. At this point plaintiff told officer Horvath, "These are the boys, officer, please take them away." Plaintiff was now out in the middle of Ridgeland Avenue and the heavy traffic compelled him to continue across to the west side of the road. Horvath then proceeded across and was between plaintiff and Skubis and LaValley.

The verbal abuse and threats to commit immediate harm continued without any effort or act by any of the police officers to subdue or control these defendants, except, to suggest they quiet down.

Sgt. Bartuch was standing next to Souliotis and had his hand on Souliotis' shoulder but did nothing to impede or restrain Souliotis from attacking plaintiff.

Souliotis moved a distance of about four or eight feet from Sgt. Bartuch and grabbed plaintiff, picked him up and slammed him upon the trunk of a police car. During this time Souliotis had plaintiff by the throat and shouted incessantly that he was going to keep his promise to kill him. At that instant plaintiff observed officer Demblon pull up in a police car and leap out, run and pull Souliotis from plaintiff and subdue him. As plaintiff was raising himself from the ground where he had fallen from the trunk of the car, plaintiff was grasped by LaValley who screamed in plaintiff's ear that they had warned plaintiff

not to call the police or they would kill him if he did so. Defendant Posthuma because of illness, intoxication or fatigue remained in the back seat of the car. Skubis did not participate in the physical attack upon plantiff.

Eventually the assailants and their companions were placed under restraint and removed to the Village of Worth police station.

Although the initial call by plaintiff was for assistance from Chicago Ridge police, the Worth police participated at the request of Chicago Ridge police in apprehending the assailants and this took place in the Village of Worth on Ridgeland Avenue which is the dividing line between the two villages.

The evidence shows that officer Demblon, one of the Village of Worth policemen, arrived at the scene after the assault or at least just as it commenced and thus could not be charged with any negligence in not stopping or restraining the assailants. The court's direction of a not guilty verdict in his favor was proper.

Plaintiff was at the scene at the request of the police to see if he could make identifications. This he did immediately upon arrival. Yet the record shows that for at least a five minute interval Souliotis, LaValley and Skubis were on a heavily traveled thoroughfare, under arrest, and they engaged in shouting and yelling obscenities and profanities at plaintiff and casting aspersions on the morals of his daughter and loudly proclaiming their utter disdain, contempt and repeated threats to inflict physical violence upon plaintiff then and there for his failure to adhere to their prior admonitions and warnings.

Bartuch, of the Village of Worth Police Department, testified that at the time of the attack he was successfully restraining Skubis or LaValley from participating. Plaintiff, however, testified that Bartuch had his hand on Souliotis' shoulder when Souliotis managed to leave Bar-

turn's side and advance on plaintiff and attack him. Horvath and Wank, of the Village of Chicago Ridge Police Department, were standing in the midst of the assailants when the verbal and physical attack upon plaintiff occurred.

We believe that pursuant to *Pedrick, supra,* the evidence presents a factual question as to whether the defendant police officers, and therefore, their villages, were negligent in failing to take appropriate and sufficient precautions, under the circumstances, to protect plaintiff from being attacked and injured.

Defendant villages contend that the directed verdicts in their favor were proper because: (1) Plaintiff was a trustee of the Village and in that capacity he had a duty to direct and instruct police officers Wank and Horvath in the performance of their police functions and duties and since plaintiff failed to do so, his resulting injuries were the result of his own dereliction of duty; (2) Ill. Rev. Stat., ch. 24 § 3-9-4* designates a trustee a conservator of the peace and thus plaintiff had a duty to arrest the assailants and his failure to do so resulted in his being beaten. Neither contention is of any merit. There is no duty imposed upon plaintiff as a trustee to direct and instruct police officers in the performance of their duties, or to make arrests. Plaintiff's authority under the statute is permissive and does not, with great wisdom we discern, oblige a mayor, alderman and other enumerated office holders to engage in performing the duties of policemen.

In view of our resolution of this appeal we are constrained to discuss the propriety of the trial court's order that limited defendant police officers' testimony under

---

* Conservators of the Peace—Powers

"The mayor, alderman, president, trustees, marshal, deputy marshals, policemen and watchmen, in municipalities, shall be conservators of the peace. All persons specified in this section, or authorized by any ordinance, shall have power (1) to arrest . . ."

Sec. 60 of the Civil Practice Act on the basis that it was not binding on the co-defendants. This was erroneous. In *Edwards* v. *Martin,* 2 Ill. App. 2d 34, this court responded to a similar contention and at page 39 said:

> "A further contention of the defendant is that the testimony of his co-defendants, Evans and Reiser, called under section 60 of the Civil Practice Act was not admissible against him.
>
> The complaint in separate counts charged liability against Evans, Reiser and the defendant. Plaintiffs called Evans and Reiser as witnesses under section 60 of the Civil Practice Act. Without citation of authority in support thereof the contention is made that their testimony could not be considered as against the defendant. The statute under which Evans and Reiser were called provides substantially that any party to a suit may be examined *as if under cross-examination at the instance of the adverse party or parties.* There is no indication in such provision that the testimony adduced from a party called as a witness thereunder is not admissible against all parties to the suit. So far as the testimony of a party called adversely is concerned it differs in no respect from any other evidence in the record. It is offered as proof of the facts and circumstances upon which the plaintiff bases his claim to a right to recover. The trial court did not err in holding that the testimony of Evans and Reiser was admissible against the defendant. *Illinois Malleable Iron Co.* v. *Brennan,* 174 Ill. App. 38; *Kokan* v. *Costello,* 347 Ill. App. 41."

We therefore affirm the judgment as to defendant Demblon, but reverse and remand for a new trial as to the other police officers and the Villages of Worth and Chicago Ridge.

AFFIRMED IN PART, REVERSED AND REMANDED IN PART.

DRUCKER and ENGLISH, JJ., concur.

Appendix C*

IN THE

Supreme Court of Illinois

JAMES L. GARDNER, *Plaintiff-Appellant,* *vs.* VILLAGE OF CHICAGO RIDGE, a municipal corporation, et al., *Defendants-Appellees.*	Appeal from the Appellate Court of Illinois, First District, There Heard on Appeal from the Circuit Court of Cook County. Honorable Elmer N. Holmgren, Trial Judge.

APPEAL AS A MATTER OF RIGHT OR, IN THE ALTERNATIVE, PETITION FOR LEAVE TO APPEAL.

Now come Village of Chicago Ridge, a municipal corporation, Village of Worth, a municipal corporation, Steve Horvath, Stanley Wank, and Bernard Bartuch, by their respective attorneys, and appeal as a matter of right from the judgment of the Appellate Court of Illinois for the First District.

In the alternative, the respective defendants pray that they be granted leave to appeal to this court from the judgment of the Appellate Court of Illinois for the First District, which reversed in part and affirmed in part an order of the Trial Court directing a verdict in favor of petitioners herein.

* Appended to the original Appeal as a Matter of Right or, in the Alternative, Petition for Leave to Appeal was the Appellate Court opinion herein, which is omitted in "Appendix C", but which is set forth in "Appendix B" of the Petition for a Writ of Certiorari.

RELEVANT DATES.

The opinion of the Appellate Court of Illinois for the First District was filed in this cause on August 19, 1970. A petition for rehearing was filed, as was denied on October 5, 1970.

POINTS RELIED UPON FOR REVERSAL.

(a) As to Appeal as a Matter of Right:

I. The decision of the Appellate Court violates the Constitutional guarantee of equal protection of the law in holding that it is error to limit the testimony of a witness called under Section 60 of the Civil Practice Act to the party as to whom the witness is called.

(b) In Support of the Petition for Leave to Appeal:

II. The opinion of the Appellate Court is based upon a theory of a "special duty" owed by defendant police officers and municipalities to plaintiff, and upon a theory that plaintiff's positions as Trustee, Chairman of the Police Committee and Conservator of the Peace of the Village of Chicago Ridge do not impose a duty on plaintiff at least commensurate with any duty of the police officers —both novel concepts which are at variance with the established law of Illinois.

III. Leave to Appeal should be granted for the reasons set forth in paragraph I above.

FACTS.

The facts as recited in the opinion of the Appellate Court are substantially correct. Where there are facts which require further development, they are specific enough that they can be more appropriately discussed under each individual point.

ARGUMENT.

(a) As to Appeal as a Matter of Right:

The decision of the Appellate Court gives rise to a Constitutional question. It is this question which authorizes appeal to this court as a matter of right under the provisions of Supreme Court Rule 317 (Ill. Rev. Stat. Ch. 110A, Sec. 317).

I.

The decision of the Appellate Court violates the Constitutional guarantee of equal protection of the law.

The opinion of the Appellate Court concludes with a holding that it is error to limit the testimony of a witness called under Section 60 of the Civil Practice Act to the party as to whom the witness is called. This holding presents a Constitutional issue.

Equal protection of the law is guaranteed by Amendment XIV to the Constitution of the United States.

The holding denies to the petitioners equal protection of the law. The holding means that there is a distinction between the defendant who is sued alone and the defendant who is joined as a co-defendant with others. This is a completely arbitrary distinction with no possible justification. Where a defendant is sued alone, Section 60 may be used only if the witness sought to be called is a witness who meets the requirements of the statute. Where a witness is called who is not adverse at the time of calling, the provisions of Section 60 do not apply, *Bituminous Casualty Corp.* v. *Harrisburg,* Ill. App. 243, 42 N. E. 2d 971 (1942). The witness may be called, of course, but only subject to those rules applicable to witnesses who do not qualify as "adverse". The Appellate Court now holds that a different situation exists if there is more than one defendant. According to the ruling of that court, the

presence of other defendants deprives a litigant of the protection built into Section 60. Now, even though a witness is not adverse as between the plaintiff and one defendant, the plaintiff may call him to testify against that defendant under Section 60 if the witness is adverse as between the plaintiff and any *other* defendant. The law provides and can provide no justification for such unequal treatment. There is no need for it. Our practice has always made provision for the receipt of evidence limited to a certain purpose or to certain parties. See ILP, Trial, ¶ 45; see generally McCormick, *Evidence* ¶ 59, pp. 135-6. There is absolutely no reason why such practice should not be followed with respect to evidence received under the provisions of Section 60. To permit Section 60 to be circumvented by naming a witness as a defendant would be to make a mockery of the rule and destroy the carefully erected protection built into the rule.

If Section 60 is to have any effect at all, it must be applied uniformly. The testimony of a witness called under Section 60 may be received only against the party as to whom the witness is called. That is the only uniform application of the section which can be made. Unequal application of the rule as between litigants is a denial of the equal protection of the law which the Constitution guarantees to all litigants.

(b) In Support of Petition for Leave to Appeal:

II.

The opinion of the Appellate Court is based upon a theory of a "special duty" owed by defendant police officers and municipalities to plaintiff, and upon a theory that plaintiff's positions as trustee, Chairman of the Police Committee and Conservator of the Peace of the Village of Chicago Ridge do not impose a duty on plaintiff at least commensurate with any duty of the police officers —both novel concepts which are at variance with the established law of Illinois.

Twice this case has been to the Appellate Court for the First District. Twice that court has issued opinions containing reasoning unknown—and anomalous—to Illinois law.

Plaintiff seeks to recover damages from municipalities for the alleged negligence of police officers in failing to protect him from assault by a third person. No reported decision in this state has ever upheld recovery upon such theory. Indeed, that theory is directly contrary to the recognized rule that "Failure of a policeman to prevent others from violating the law, to the injury of some third party, does not itself subject the municipality to liability for the injuries," *Keane* v. *City of Chicago*, 98 Ill. App. 2d 460, 240 N. E. 2d 321 (1st Dist., 1968). The only decision of any court in this state which has allowed such a theory as plaintiff's to survive a motion to strike has been the decision of the Appellate Court in the prior appeal in this case, 71 Ill. App. 2d 373, 219 N. E. 2d 147 (1st Dist. 1966)—and now that decision has been reaffirmed in the opinion below (Appendix 1a).

Because the prior opinion was based upon pleading only and directed only remandment for trial, it was not a decision review of which was obtained at the time it was rendered. The plaintiff has now had the opportunity to present his evidence. That resulted—and properly so as we shall point out—in a directed verdict at the close of his case. The Appellate Court has again, however, reversed the trial court* and remanded the case for a new trial, holding that there was a factual question as to the negligence of defendant police officers and villages in light of the evidence presented and their duty as set forth in the prior opinion. Now that the exact nature of plaintiff's case is known to the court, these defendants respectfully urge this court to consider at this time the extremely im-

* With the exception of the affirmance of the directed verdict as to one defendant—a point which is not at issue here.

portant issues raised by this case. Its importance to police, municipalities and private citizens cannot be overstressed —especially in these times of increased turmoil and violence.

In the prior opinion of the Appellate Court it was suggested that if a "special duty" existed between the police and plaintiff, the general rule as to the non-liability of municipalities for the failure of policemen to prevent others from injuring a third party does not apply. This "special duty", according to the court, arose from the allegations of the complaint that plaintiff was asked by one of the policemen to accompany him to identify four suspects of an assault committed against the plaintiff earlier that evening, that the policemen knew one of the suspects was capable of physical violence, and that the suspects were in the custody of the police, yet they (the suspects) proceeded to beat the plaintiff. The court held that the complaint alleged sufficient facts to show that the police called the plaintiff into a "position of peril" and, therefore, the police assumed a duty to exercise reasonable care to protect him from injury.

This concept of "special duty" was unknown to Illinois law prior to the first *Gardner* decision. The concept was "borrowed" from the reasoning of the New York decision of *Schuster* v. *City of New York,* 5 N. Y. 2d 75, 154 N. E. 2d 534 (1958), an extreme decision which itself was without precedent and which has gained very little support in the years since it was handed down. Indeed, the 4-3 decision in *Schuster* has been restricted by even the New York courts to situations wholly distinguishable from the case—*i.e.,* situations where the city *voluntarily undertook the responsibility* of protecting individuals, and then exposed them, without adequate protection, to the risks which materialized into actual losses. See *e.g., Riss* v. *City of New York,* 240 N. E. 2d 860 (1968) and *Motyka* v. *City of Amsterdam,* 204 N. Y. 2d 635 (1965). Here, there is no

allegation that defendants undertook to protect the plaintiff. Likewise, the facts adduced at trial reveal that there was no undertaking to protect the plaintiff. It is clear, therefore, that while the facts of this case may fall within the *Schuster* doctrine as originally promulgated, they do not fall within the limited factual area to which the New York courts have now restricted *Schuster*.

The courts of New York have realized that the rule of law crea ed in *Schuster* was contrary to established principles of law and contrary to the best interests of society. Since the basis for the holding in the first *Gardner* decision was the rule of law announced in *Schuster*, later opinions relegating the *Schuster* doctrine to the traditional concept of liability for the negligent performance of a voluntary undertaking must be given great weight. The recognition by the courts of New York of the extreme nature of the *Schuster* doctrine and their consequent restriction of that doctrine makes it even more imperative that this court exercise its right of review in the present case to prevent this doctrine from gaining any further semblance of validity.

While the New York courts have restricted the *Schuster* opinion, one Illinois case appears to have likewise restricted *Gardner*. Although the court in *Keane* v. *City of Chicago*, 98 Ill. App. 2d 460, 240 N. E. 2d 321 (1968) paid lip service to the principle of *Gardner*, it affirmed an order striking plaintiff's complaint. The complaint alleged that a dangerous condition existed at the school where plaintiff taught; that the police knew of this dangerous condition; and that they removed police protection from the school with knowledge of the condition of danger. The motion to strike necessarily admitted these allegations. The situation there alleged was not, therefore, one common to the community but special to that time and place. The danger to the plaintiff was clearly alleged to be "special". The

complaint, as in *Schuster,* alleged the voluntary assumption and the subsequent withdrawal of that protection and exposure to danger. Nevertheless, the court held there was no "special duty" to protect—even though Mrs. Keane was killed. This holding clearly cannot be reconciled with the principle of law set forth in *Gardner* and must be construed as restricting the broad statements made in *Gardner.*

This court has noted the *Gardner* and *Schuster* holdings in only one case. The holding in *Huey* v. *The Town of Cicero,* 41 Ill. 2d 361, 243 N. E. 2d 214 (1968) was based, however, on the general rule that a municipality is not liable for failure to supply police protection. The "special duty" exception was mentioned, but it was so clear from the allegations of the complaint that plaintiff's case would not come within that exception that this court did not consider it further. These defendants urge this court to study at this time the issues created by the "special duty" exception. We urge the court to consider the fundamental policy issues behind the basic principle of non-liability of municipalities and to inquire as to why the *Schuster-Gardner* rule has failed to gain acceptance in other jurisdictions. Only in this manner can this dangerous doctrine be put to rest.

Even should this court, for some reason unknown to the law and public policy, ascribe to the "special duty" concept of *Schuster* there remains a question of extreme import to this court. The evidence adduced at the trial in this case is so at variance with the considerations which give rise to the "special duty" that this court must reverse the Appellate Court's holding that such a duty exists in this case.

There are a number of very significant facts revealed by the evidence. Let us discuss some of them.

The plaintiff was, at the time of the events complained of, a Trustee of the Village of Chicago Ridge. What we have, therefore, is a spectacle of a Trustee of the Village suing the Village of which he is Trustee for the alleged negligence of the Village in failing to provide him with protection. A Village is a creature of statute. It is a legal entity which has no existence save that given to it by legal fiction. Of necessity, it can act only through the agency of individuals. Conversely, if the Village fails to act, that failure must be the failure of someone. The complaint of this plaintiff is not that the Village or any of its officials or employees did anything to injure him—his complaint is *solely* that the Village failed to prevent a third party from injuring him. In the light of such a contention, one must ask, "Who represents the Village?"

The statutes which provide for the creation of an entity such as a Village prescribe the form of organization. In a Village the responsibility for conducting the affairs of the Village is vested in Trustees. These are persons who are elected by the citizens to manage the affairs of the Village and who are, by that election, "trusted" to manage in the public interest. More than anyone else, it is the Trustee who represents the Village. It is he—above all others—who is charged with the responsibility of seeing that duties imposed upon the Village are carried out. The responsibility goes with the office. He is a Trustee at all times and at all places. Wherever the interests of the Village are in trust, they are in trust to him. If any action is required of the Village at any place where he is present, then that action is required of him.

We have presented in this litigation the spectacle of a Trustee who charges his own Village with misconduct. The misconduct claimed is an alleged error of omission. There is no pretext that the Village or any representative of the Village injured the Trustee. Third parties inflicted whatever injury was inflicted. The liability of the Village

is claimed to arise from the failure of representatives of the Village to prevent the assaults which caused the injury. There were two assaults. The first took place at a dance hall at which the Trustee was the only representative of the Village present. The second took place at another location where the Trustee and two employees of the Village were present. The Trustee was—by any standard which could be devised—the senior representative of the Village present. What we have, therefore, is a situation in which the plaintiff-Trustee claims a right to impose upon his own Village liability for inaction in a situation at which he was present and at which he was the senior representative of the Village present. If there was any duty of any kind imposed upon his Village to take any action under such circumstances, that duty rested primarily upon him. It is unconscionable to suggest that he can impose liability upon the Village which he serves as Trustee by failing to act upon behalf of the Village where action was required. It would be equally strange if a Trustee could by his own failure to act transfer to another his duty and his responsibility and then claim reimbursement arising from his own dereliction.

But the fact that the plaintiff was the senior representative of the Village present at the time of his alleged injury is only part of the "special relationship" which the evidence revealed.

Plaintiff was Chairman of the Police Committee of the Village of Chicago Ridge.

In the Village of Chicago Ridge—as in all villages—the work of the Trustees was divided into certain areas of particular responsibility and committees were designated to deal with each area. One division so created had responsibility for the police. It was known as the Police Committee. At the time here relevant the Chairman of that Committee was the plaintiff in this case (A. 160).

Policemen employed by the Village did not receive their pay without the approval of this committee. Any employee of average intelligence has no difficulty whatsoever under such circumstances in identifying "the boss." Plaintiff was, by every reasonable standard, the superior of the police officers of the Village of Chicago Ridge. Where he was present, he was the officer in charge. This was true not only from the standpoint of the police officers but also from the standpoint of the Village. The Village had a right to expect that if the policemen in the employ of the Village were in a position which would require any instruction or direction, any Trustee who was present on such an occasion would give such direction, and most particularly the Chairman of the Police Committee would give such instruction. Plaintiff did nothing. He seeks to impose liability upon the Village for his dereliction of duty in that regard.

But that is not the entire extent of the "special relationship" which did, in fact, exist between plaintiff-Trustee and the Village. Let us consider a question of law.

Plaintiff was a Conservator of the Peace.

The Municipal Code of 1961 dealt specifically with the "General Functions and Duties of Officers." The express provision here relevant is found in Section 3-9-4, Division 9, Chapter 24, Ill. Rev. Stats. 1961, and reads as follows:

> "The . . . trustees . . . policemen . . . in municipalities shall be conservators of the peace. All persons specified in this section, or authorized by any ordinance, shall have power (1) to arrest or cause to be arrested, with or without process, all persons who break the peace, or are found violating any municipal ordinance or any criminal law of the state; (2) to commit arrested persons for examination; (3) if necessary, to detain arrested persons in custody over night or Sunday in any safe place, or until they can be brought before the proper magistrate; and (4) to exercise all other powers as conservators of the peace that the corporate authorities may prescribe."

Plaintiff "had a little star that said 'Trustee' ". This was no accident. The star was provided under the authority of the statute above quoted—the same statute which gave authority to the policemen. There was, however, from a factual point of view, a distinct difference between his position and that of the policemen. He was a Conservator of the Peace in whose presence a breach of the peace had been committed. In that respect his position was quite different from that of the other policemen. None of the policemen was present at the Hall when the original offense took place. None of the policemen had the advantage of his special knowledge. Plaintiff not only witnessed that offense—he was the victim of the assault which took place at that point. He was the only person present having clear authority under the law to make an arrest. If no subordinate of the plaintiff had been present, the plaintiff still would have had the authority to arrest. That he secured the assistance of his own police, or of the police of a neighboring community, could—at the most—do no more than create a situation in which they were engaged jointly in carrying out a police function.

By any view of the evidence in this case, the plaintiff was the person who possessed the superior knowledge and the overriding obligation. What this case actually involves is a claim by one police officer against his fellow officers for their alleged failure to protect him in the carrying out of that which was their mutual duty, but his primary obligation. There has never been a case in any jurisdiction authorizing recovery in such a "special situation." The duty of the plaintiff in this case was equal to or greater than the duty of the defendants.

Moreover, as we have pointed out above, plaintiff was himself the representative of that principal whose claimed "special duty" was being carried out, and if any special duty ever existed at all, it rested as much or more upon him

than upon anyone else. He cannot claim compensation for his own dereliction of duty.

The plain fact is that there was no breach of a "special duty" because there was no "special duty". Rather, the law imposes upon this plaintiff a duty appropriate to his position. The Appellate Court has cited no authority in support of its statement that "There is no duty imposed upon plaintiff as a trustee to direct and instruct police officers in the performance of their duties . . ." There is no rule of law such as that stated by the court. There is no justification for creating one.

The court states that plaintiff's authority under the statute was permissive. Of course, the *exercise* of the authority absolutely *granted* by the statute is permissive. It is likewise permissive with the policemen who receive their authority from the very same statute. How can the plaintiff then urge a "special duty" on the part of those policemen? If the statute is permissive as to plaintiff, it is permissive as to the policemen. If no duty exists as to the plaintiff, no duty exists as to the policemen. If a duty exists as to the policemen, then at least a corresponding duty exists as to the plaintiff. The opinion of the Appellate Court totally fails to comprehend this point.

The trial judge was completely right in holding "There is no special duty to Mr. Gardner." There was, in fact, a special duty imposed upon Mr. Gardner. It was his duty to keep the peace. It was his duty to arrest the man who assaulted him. For his failure to carry out that duty, he may not impose liability upon those who entrusted him with the duty. It is not Mr. Gardner who has a claim against the Village—it is the Village which has a right to charge Mr. Gardner with dereliction of duty—if there was any dereliction at all. What is his concept of "Trustee"? Who acts upon behalf of the Village if he does not? Why does he have a star? Why does the statute authorize him to keep the peace—the same statute which gives authority

to the other policemen whose actions he would criticize? Indeed the court's opinion places "an all but impossible burden" upon the Village if it must respond in damages to its own Trustees for their own failure to carry out their duty. This court must relieve that burden.

III.

Leave to Appeal should be granted for the reasons set forth in paragraph I above.

The Constitutional issue set forth in paragraph I above provides an independent basis for review. The question of the extension of Section 60 beyond its intended scope is one which warrants the exercise of the supervisory authority of this court. The decision of the Appellate Court should be set aside promptly to ensure that the improper practice there sanctioned will not gain a foothold in the law of this state.

Respectfully submitted,

WILDMAN, HARROLD, ALLEN & DIXON,
6 North Michigan Avenue,
Chicago, Illinois 60602,
Attorneys for Village of Chicago Ridge, a Municipal Corporation,

CROOKS & GILLIGAN,
1 North LaSalle Street,
Chicago, Illinois 60602,
Attorneys for Village of Worth, a Municipal Corporation,

DOWD, DOWD & DOWD,
77 West Washington Street,
Chicago, Illinois 60602,
Attorneys for Horvath and Wank,

JOHN M. SULLIVAN,
One First National Plaza,
Chicago, Illinois 60670,
Attorney for Bartuch.

LIBRARY
SUPREME COURT, U. S.

No. 1633

Supreme Court, U.S.
FILED
MAY 25 1971
E. ROBERT SEAVER, CLERK

In the

Supreme Court of the United States

OCTOBER TERM, 1971

JAMES L. GARDNER,

vs.

VILLAGE OF CHICAGO RIDGE, a Municipal Corporation, VILLAGE OF WORTH, a Municipal Corporation, STANLEY WANK, STEVE HORVATH, and BERNARD BARTUCH,

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

JAMES J. REIDY
221 N. La Salle Street
Chicago, Illinois 60601

RICHARD LUCY
221 N. La Salle Street
Chicago, Illinois 60601

JAMES R. MITCHELL
134 N. La Salle Street
Chicago, Illinois 60603
Attorneys for Plaintiff-Respondent

The Scheffer Press, Inc.—ANdover 3-6850

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

No. 1633

JAMES L. GARDNER,

vs.

VILLAGE OF CHICAGO RIDGE, a Municipal Corporation, VILLAGE OF WORTH, a Municipal Corporation, STANLEY WANK, STEVE HORVATH, and BERNARD BARTUCH,

---

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

MAY IT PLEASE THE COURT:

Defendants' Petition for Writ of Certiorari is the latest furrow in a well-plowed field of controversy between the parties. This case has twice been reviewed by the Appellate Court of Illinois and on each occasion the decision of that Court has again been reviewed by the Supreme Court of Illinois. Defendants' seek by this Petition to secure a fifth review of an insubstantial question of limited importance which was not properly preserved. The Petition for Writ of Certiorari should be denied.

I.

THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED BECAUSE THE CLAIMED CONSTITUTIONAL QUESTION IS WITHOUT SUBSTANCE.

Defendants' purported Constitutional issue is without substance — a factor which may explain its belated appearance in this case at a time when other points have been exhausted. The Appellate Court has only indicated that where a witness is adverse within the meaning of Section 60 of the Practice Act, his testimony is properly given the weight to which it may be entitled and that such evidence may be considered against all defendants. Nothing in such a holding suggests that there is any invidious distinction being made which amounts to a deprivation of equal protection of law. If the witness is adverse (as he must be if the statute applies) then his testimony can, practically speaking, be elicited only if he may be interrogated as though on cross examination. Once that testimony has been properly elicited, it is entitled to as much weight as that of any other witness whether elicited through cross or direct examination. To so hold does not amount to an unequal treatment of litigants but to a consistent and practical accommodation of the rules of evidence to the problems of multiple party litigation. See *Edwards* v. *Martin,* 2 Ill. App.2d 34, 117 N.E.2d 864 (3d Dist. 1954); *Day* v. *Ukena,* 351 Ill.App. 26, 113 N.E.2d 574 (3d Dist. 1953); *Smith* v. *Murphy,* 384 Ill. 34, 40-41, 50 N.E.2d 844 (1943); *Kough* v. *Hoehler,* 413 Ill. 409, 109 N.E.2d 177 (1952) and *McInnis* v. *Shapiro,* 293 F.Supp. 327 (N.D. Ill. 1968) affirmed, 394 U.S. 322 (1969). Notwithstanding defendants' claims to the contrary, there is nothing inherently unfair or arbitrary in holding that evidence given in response to a valid and proper exami-

nation under Section 60 of the Practice Act should be admissible against all parties defendant.

II.

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED BECAUSE THERE IS NO SHOWING THAT THE POINT WAS PROPERLY RAISED IN THE TRIAL COURT.

Defendants have for the first time on appeal sought to raise a Constitutional question claiming that Section 60 of the Civil Practice Act, as construed by the Appellate Court, deprives them of equal protection of the laws. Defendants did not raise this point until their petition for rehearing in the Appellate Court though the facts on which the argument was based were as apparent at trial and on appeal to the Appellate Court as now. The claim that this question has just arisen is false. Under such circumstances defendants are precluded from raising a Constitutional point at this eleventh hour. *People* v. *Brand,* 415 Ill. 329, 233-34, 114 N.E.2d 370 (1953), *cert. den.,* 374 U.S. 959; *Myers* v. *Myers,* 404 Ill. 606, 609, 90 N.E.2d 186 (1950); *Adams* v. *Board of Education,* 415 Ill. 227, 112 N.E.2d 473 (1953).

In *People* v. *Brand,* 415 Ill. 329, 114 N.E.2d 370 (1953) the Court stated the rule in language which is clearly applicable here:

> ". . . It is a fundamental that the question of the constitutionality of a statute cannot be properly raised for the first time in a court of review, but must have been presented to the trial court and ruled upon by it, and the person challenging its validity must have preserved proper exceptions to such ruling. * * * It is a rule of universal application that the reversal of a judgment cannot be urged

> upon a ground not submitted to the trial court and upon which it did not and was not asked to decide. * * *" 415 Ill. at 337. (Citations omitted.)

Certainly the Supreme Court of the United States should not be called upon to pass upon a constitutional question involving the construction of the Illinois Civil Practice Act which was never properly presented to the Illinois Courts.

Apart from the insubstantiality of the question itself, it seems clear that this question lacks the importance which would justify a review by the Supreme Court of the United States. No conflicting decisions have been cited and no showing has been made that the issue is sufficiently urgent to require this Court to act. The point is at best obscure. It concerns a question of civil trial procedure and evidence that his already been amply considered by the Illinois Supreme Court.

CONCLUSION

Plaintiff respectfully submits that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

JAMES J. REIDY
RICHARD LUCY
JAMES R. MITCHELL
Attorneys for Plaintiff-Respondent